No. 78-156

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA

v.

HUGH J. ADDONIZIO

UNITED STATES OF AMERICA

v.

THOMAS J. WHELAN and THOMAS M. FLAHERTY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-21a) is reported at 573 F.2d 147. The opinion of the district court in *Addonizio* (App. E, *infra*, pp. 27a-32a) is not reported. The opinion of the United States District Court for the District of New Jersey in *Whelan* (App. F, *infra*, pp. 33a-42a) is reported at 427 F. Supp. 379. The opinion of the United States District Court for the Middle District of Pennsylvania in a related proceeding involving respondents Whelan and Flaherty (App. G, *infra*, pp. 43a-50a), in which no review is being sought in this Court, is not reported.

JURISDICTION

The judgments of the court of appeals (Apps. B, C and D, *infra*, pp. 22a-26a) were entered on February 27, 1978. On May 19, 1978, Mr. Justice Brennan extended the time within which to file a petition for writ of certiorari to and including July 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court may revise a lawful sentence on collateral attack when decisions of the Parole Commission "frustrated the sentencing intent" of the court.

STATUTES AND RULE INVOLVED

1. 18 U.S.C. 4205(a) provides:

> Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

2. 28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
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> * * * * *
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> If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

3. Fed. R. Crim. P. 35 provides:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

STATEMENT

A. The Parole Release System

A district judge has numerous options when sentencing a defendant who has been convicted of a crime. A number of these options depend on the age or drug addiction of the defendant,[1] but the three options most commonly used are specified by 18 U.S.C. 4205.[2] A sentence under Section 4205(a) requires the

[1] See, for example, 18 U.S.C. 4251-4255 (narcotic addicts), 5005-5026 (offenders less than 22 years old at the time of conviction), 5031-5042 (juvenile delinquents), 4216 (offenders 22 to 25 years old at the time of conviction), 4205(c) (commitment for psychological study).

[2] The provisions of Section 4205 are a recodification of 18 U.S.C. (1970 ed.) 4202 and 4208 accomplished by the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219-231. The Act also renamed the Board of Parole as the Parole Commission. For purposes of clarity, this petition uses both the numbering system and the terminology of the present statute, regardless of the numbering system and terminology in effect at the time particular events took place.

prisoner to serve one-third of the maximum sentence before becoming eligible for parole.[3] A court may elect to impose sentence under Section 4205(b)(2), in which event the prisoner "may be released on parole at such time as the [Parole] Commission may determine." Or a court may designate, under Section 4205(b)(1), a minimum term of imprisonment that will establish parole eligibility somewhere between the beginning of the sentence and one-third of the maximum.

Courts may suspend any sentence they impose and place the defendant on probation for a period that does not exceed five years. 18 U.S.C. 3651. A court may not, however, split a lengthy sentence between imprisonment and probation in a way that dictates the amount of time the prisoner spends in jail. Probation may not be combined with a sentence entailing incarceration in excess of six months (Section 3651, ¶ 2).

A prisoner is entitled to be released at the expiration of his maximum sentence, less "good time" computed according to 18 U.S.C. 4161. Good time can be as much as one-third of the sentence, but more commonly it amounts to approximately one-quarter of the sentence. A prisoner also acquires an expectation of release slightly before the point established by ac-

[3] If the sentence is more than 30 years, the prisoner is eligible for parole after serving ten years.

cumulated good time. Under 18 U.S.C. 4206(d) any prisoner sentenced to more than five years' imprisonment "shall be released on parole after having served two-thirds of each consecutive term" or 30 years, whichever is first, unless the Commision determines that the prisoner "has seriously or frequently violated institution rules" or that there is a "reasonable probability" that the prisoner would commit further crimes.

During the period between the prisoner's first eligibility for parole and the two-thirds point, the Commission has substantial discretion to decide whether to grant release on parole. 18 U.S.C. 4206(a). Under 18 U.S.C. (1970 ed.) 4203, which was in effect when respondents were sentenced, the Commission was entitled to consider any aspect of the public welfare in making its decision. Under the present statute the Commission must consider "the public welfare" and whether "release would * * * depreciate the seriousness of [the] offense or promote disrespect for the law," standards that give the Commission ample if not unlimited discretion. The Commission now must exercise its discretion pursuant to published guidelines that establish approximate ranges of time that most offenders can expect to serve. See 18 U.S.C. 4203 (a)(1) and 4206(a).

Until 1970 the Commission exercised its discretion case by case, using no published criteria or guidelines. In response to widespread criticism that this led to arbitrary and erratic decisions, with similarly situated persons receiving materially different treatment, the Commission began to experiment with structured

release criteria that took into account the nature of the offense and the offender's personal characteristics. These offense and offender characteristics were assigned weights and converted into numerical values; after computing the numerical values, the prisoner and the Parole Commission could turn to a table to find a range (*e.g.*, 36 to 45 months) that most (but not all) of the persons with similar characteristics could expect to serve, with good institutional behavior, before release.[4] The program was commenced in 1970, before respondents were sentenced,[5] and it was revised in November 1973 (38 Fed. Reg. 31942). The present guidelines are codified at 28 C.F.R. 2.20.[6]

The guidelines are "the result of an effort to introduce more consistency in parole decision-making" (*United States* v. *DiRusso*, 535 F.2d 673, 674 (C.A. 1)), and they serve this function principally by enabling the Commissioners to announce—to the Commission's hearing examiners especially—how the Com-

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[4] For a history of this development and a description of the system, see Stanley, *Prisoners Among Us: The Problem of Parole* (1976); Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975).

[5] See United States Board of Parole, *Biennial Report* 20-21 (1970). The program commenced in 1970 was a precursor to a more elaborate experiment begun in 1972. The 1972 experiment in the Commission's northeast region (which includes New Jersey) involved a table of factors and the computation of guideline release ranges similar to those in use today.

[6] The guidelines are subject to periodic study and revision. See 42 Fed. Reg. 39808. See also S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 27 (1976).

mission exercises the discretion given it by statute. As the Conference Committee put it in recommending enactment of the current statute, "the parole authority must have in mind some notion of the appropriate range of time for an offense", and the "use of guidelines * * * will sharpen this process and improve the likelihood of good decisions." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976). But the guidelines are not inflexible. They establish broad ranges rather than fixed periods of confinement; they assume good institutional behavior, so that extraordinary behavior (good or bad) will cause a departure from the guidelines; and the Commission has generally reserved the privilege to depart from the guidelines whenever it concludes that circumstances warrant. 28 C.F.R. 2.18, 2.20(c).

B. Addonizio

Following a jury trial in the United States District Court for the District of New Jersey, respondent Addonizio was convicted of conspiring to interfere with interstate commerce by extortion, and of 63 counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. The evidence demonstrated that Addonizio, while Mayor of Newark, New Jersey, had engaged in an extensive conspiracy to extort money from persons doing business with the City. District Judge Barlow sentenced him on September 22, 1970, to 10 years' imprisonment with a fine of $25,000. The court of appeals affirmed. *United States* v. *Addonizio*, 451 F.2d 49 (C.A. 3), certiorari denied, 405 U.S. 936.

Respondent's sentence was imposed under what is now 18 U.S.C. 4205(a), and he became eligible for parole on July 3, 1975, after serving one-third of his sentence. On July 8, 1975, the Commission, after a hearing, decided not to release respondent. It fixed January 1977 as the earliest date for release. The Commission held another hearing on December 8, 1976; it announced on January 13, 1977, that it would not release Addonizio before the expiration of his sentence (less good time credits). The Commission explained that Addonizio's crimes were so extensive and demonstrated such a breach of public trust that a decision to release him would depreciate the seriousness of his offenses and promote disrepect for the law (App. A, *infra*, pp. 12a-13a).

Addonizio filed a motion, invoking the district court's jurisdiction under 28 U.S.C. 2255, asking the court to resentence him to time served. Judge Barlow stated that in sentencing Addonizio he had expected him to be confined "for a period of approximately three and one-half to four years" (App. E, *infra*, p. 28a) and to be held longer only if he had a poor institutional record. Judge Barlow explained that he had not anticipated that the Commission would give significant emphasis to the gravity of Addonizio's offense, and he concluded that because of this emphasis Addonizio "has not received the type of meaningful parole hearing contemplated by the Court" (*id.* at 30a). After determining that he had jurisdiction under Section 2255 to reduce any sentence concerning which his expectations had been frustrated (*id.* at

31a-32a), Judge Barlow reduced Addonizio's sentence to time served as of April 27, 1977.[7]

C. Whelan and Flaherty

Following a jury trial in the United States District Court for the District of New Jersey, respondents Whelan and Flaherty were convicted of two counts of conspiracy to commit extortion, and of 27 counts of extortion, in violation of 18 U.S.C. 1951 and 1952. Whelan was the Mayor, and Flaherty a city councilman, of Jersey City, New Jersey (App. G, *infra*, p. 50a). The evidence showed that they and others extorted at least $1.2 million from persons doing business with the City and deposited those sums in numbered accounts in Florida. The money has never been recovered. See Apps. F and G, *infra*, pp. 34a-36a, 49a-50a.

District Judge Shaw sentenced respondents to 15 years' imprisonment on August 10, 1971. In light of a plea agreement on tax evasion charges, Whelan and Flaherty did not appeal their convictions.[8] They did, however, file motions for reduction of sentence pursuant to Fed. R. Crim. P. 35, and Judge Shaw denied those motions on May 16, 1972 (App. F, *infra*,

[7] The court of appeals stayed the order reducing Addonizio's sentence. This Court then vacated the order of the court of appeals. *Addonizio* v. *United States*, 431 U.S. 909.

[8] The tax evasion sentences, which were affirmed by the court of appeals, run concurrently with the extortion sentences. See *United States* v. *Kenny*, 462 F.2d 1205 (C.A. 3), certiorari denied *sub nom. Sternkopf* v. *United States*, 409 U.S. 914.

pp. 40a-41a). The court of appeals affirmed on December 8, 1972 (*id.* at 41a). Respondents then filed an action under 28 U.S.C. 2255 contending that their sentences were arbitrary and excessive, but Judge Shaw denied relief on December 12, 1973, and the court of appeals again affirmed. See App. F, *infra*, p. 41a.

Whelan and Flaherty, like Addonizio, were sentenced under 18 U.S.C. 4205(a). They became eligible for parole in 1976 after serving one-third of their sentences. The Parole Commission held a hearing in June 1976; on July 12, 1976, it denied their applications for parole and set June 1978 as the date for the next hearing (App. F, *infra*, p. 41a). The Commission explained that the guideline ranges for respondents indicated that they should serve a total of 26 to 36 months' imprisonment, but that respondents would not be released because their offenses were part of large-scale organized criminal activity and involved a breach of the public trust (App. G, *infra*, p. 48a).

Whelan and Flaherty then filed two suits challenging their confinement. One, invoking jurisdiction under 28 U.S.C. 2255, was filed in the sentencing court. It was assigned to Judge Biunno, because Judge Shaw had died. The other, invoking jurisdiction under 28 U.S.C. 2241, was filed in the district of confinement and assigned to Judge Muir.

Judge Biunno decided the Section 2255 case in March 1977 (App. F, *infra*, pp. 33a-42a). He concluded that most of respondents' arguments were "a rehash of what was argued before Judge Shaw" (*id.* at 35a), and that the only new point was a contention

that decisions of the Parole Commission had frustrated Judge Shaw's sentencing intent. Judge Biunno stated (*ibid.*): "the real issue is whether the Parole Commission's denial of parole was arbitrary and capricious." After examining the nature of respondents' crimes, Judge Biunno concluded that the Commission properly denied parole because "[t]he spectacle of Whelan and Flaherty being paroled and free to escape with their ill-gotten gains" would be "revolting" (*id.* at 36a). Judge Biunno also examined the statements Judge Shaw had made during earlier proceedings and determined that "a resentencing now would inevitably frustrate Judge Shaw's intent on sentencing" (*id.* at 37a n. 2). Judge Biunno therefore denied respondents' motions to reduce sentence.

Judge Muir decided the Section 2241 case in September 1977 (App. G, *infra*, pp. 43a-50a). He concluded that a court sitting in *habeas corpus* may correct arbitrary and capricious decisions by the Commission (*id.* at 47a-48a). He held, however, that it was appropriate for the Commission to deny parole to Whelan and Flaherty in light of the nature of their crimes (*id.* at 49a-50a). He therefore denied the petitions for *habeas corpus*.

D. The Decision Of The Court Of Appeals

The United States appealed from the reduction of Addonizio's sentence, and Whelan and Flaherty appealed from the denials of relief in both of their cases. The court of appeals affirmed Judge Muir's decision, holding that Judge Muir had stated the proper standard and applied it correctly (App. A, *infra*, p. 20a).[9] The court reversed Judge Biunno's decision and affirmed in Addonizio's case.

The court first held that the district courts have jurisdiction to revise sentences under 28 U.S.C. 2255. It characterized Section 2255 and Fed. R. Crim. P. 35 —which allows reduction of sentence within 120 days after the sentence becomes final—as simply alternate methods of sentence review (App. A, *infra*, pp. 4a-6a). Then, building on three earlier cases,[10] it held that a district court may revise a sentence, lawful when imposed, in response to parole decisions that frustrate its sentencing intent. The governing principle, the court stated, is that because judges have "near absolute control over maximum punishment, it would necessarily follow that the sentencing judge's intentions and expectations as to actual time of incarceration should be vindicated to the maximum extent possible" (*id.* at 9a). The court continued: "regard for the integrity of the sentencing court, as well as concepts of decency and fair play, dictate that the court should be in a position to vindicate [its] original intentions and expectations" (*ibid.*).

These "moral considerations" (App. A, *infra*, p. 9a), the court explained, are especially applicable

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[9] Whelan and Flaherty have not sought review of this judgment—nor, of course, do we—and it therefore has become final.

[10] *United States* v. *Salerno*, 538 F.2d 1005 (C.A. 3), rehearing denied, 542 F.2d 628; *United States* v. *Somers*, 552 F.2d 108 (C.A. 3); *United States* v. *Solly*, 559 F.2d 230 (C.A. 3).

when there has been a "post-sentencing change in criteria governing parole determinations" (*ibid.*). The court thought that there had been such a change here, not so much because of the introduction of the guidelines (after all, respondents have been held in prison beyond the periods projected by the guidelines for ordinary cases) but because the Commission now considers the seriousness of the offense in deciding whether to grant parole. At the time respondents were sentenced, the court stated, sentencing courts "operated under the assumption that, given a good institutional record, and aside from a finding of probable recidivism, the [Commission] would generally grant parole upon the completion of one-third of the sentence" (*id.* at 11a). That no longer holds true, the court stated, and it found that this change in the Commission's release policy frustrated the expectation of judges who had imposed sentences before the change.

The court of appeals found this enough to require affirmance of the decision in Addonizio's case, because the sentencing judge explicitly stated that his intent had been frustrated (App. A, *infra*, pp. 12a-18a). Moreover, the court concluded, the Commission was not entitled to deny parole for the same reason that the sentencing judge had given in imposing sentence—here the seriousness of the offense. It stated (*id.* at 16a): "Traditional standards of criminal justice reject this apparent double punishment for the same factor—one punishment imposed by the sentencing court, the other by the Parole Commission." As to Whelan and Flaherty, the court ruled that they

"should have the benefit of the rule this court announces today" (*id.* at 19a), and that Judge Biunno must reconsider the case to determine whether Judge Shaw's intent had been frustrated.[10a]

REASONS FOR GRANTING THE PETITION

1. The power to determine how long a felon spends in prison is widely shared (see pages 4-8, *supra*). The Legislative Branch fixes the ranges within which sentence may be imposed. The Judicial Branch imposes sentence in each case, selecting a maximum and minimum punishment from among those authorized by Congress.[11] The Executive Branch determines the exact date of release, either through the Parole Commission or through the President's power of pardon. This case involves the allocation of release authority between the sentencing court and the Parole Commission.

The question of authority arises, at least potentially, in every criminal case. The court of appeals' statement that "a sentencing judge's intent and probable expectations should be vindicated to the fullest extent possible" (App. A, *infra*, p. 8a), and its hold-

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[10a] On July 21, 1978, the National Appeals Board of the Commission decided to release Whelan and Flaherty on parole on August 10, 1978. This does not make their case moot, however, because Whelan and Flaherty have requested a resentencing that would terminate the Commission's supervision over them. If they should be resentenced, supervision could cease immediately; without resentencing, supervision would continue until 1986. See 18 U.S.C. 4209, 4210 and 4214; App. F, *infra*, p. 37a n.2.

[11] See, *e.g.*, *Ex parte United States*, 242 U.S. 27 (courts must follow sentencing rules established by Congress).

ing that the sentencing court possesses authority under 28 U.S.C. 2255 to vindicate that sentencing intent whenever the Parole Commission uses its broad discretion in a way that the court did not anticipate, raise fundamental questions concerning the appropriate allocation of responsibility.

The courts of appeals are deeply divided concerning the extent to which sentencing courts may revise sentences in response to parole decisions. The court of appeals in the present case has adopted the view that a sentencing court can "vindicate" its "intent" whenever the Commission alters the standards under which it exercises discretion, and perhaps even when the Commission exercises its discretion in a way that the district court disapproves.[12] The Eighth Circuit has adopted a different rule, under which courts may revise some sentences, but only those imposed before November 1973 under 18 U.S.C. 4205(b)(2), which

[12] The court of appeals' decision involves sentences imposed before November 1973, when the Parole Commission adopted its guideline system (see page 7, *supra*). But because the court's rationale focuses on the frustration of the sentencing judge's subjective intent, it has much wider implications. Subjective intent can be thwarted by a revision of existing guidelines or by any decision to deny release. As the First Circuit concluded in *United States* v. *McBride*, 560 F.2d 7, 11, "The reason for the court's not anticipating the impact of [parole policy] is unimportant. The basic question is whether, when shaping its sentence, the sentencing court's failure to predict what the parole authorities would do provides any ground" to change the sentence on collateral attack. So long as the parole and sentencing decisions are made by separate bodies, it is inevitable that judges will continue to be "frustrated" by parole decisions with which they disagree. The court of appeals' decision is therefore not limited in importance to cases involving persons sentenced before November 1973.

allows immediate parole eligibility. See *Edwards* v. *United States*, 574 F.2d 937 (C.A. 8), petition for a writ of certiorari pending.[13]

The First, Second, Sixth, Seventh and Ninth Circuits, however, have held that sentencing courts have no authority to revise lawful sentences in response to parole decisions. These courts hold that it makes no difference when the sentences were imposed, and whether a change in the Commission's policies, or a decision in a particular case, frustrated the sentencing judge's expectations. See *United States* v. *McBride*, 560 F.2d 7 (C.A. 1);[14] *Persico* v. *United States*, 538 F.2d 316 (C.A. 2) (table), certiorari denied, 429 U.S. 1091;[15] *Wright* v. *United States*, 557 F.2d 74 (C.A. 6);[16] *Coil* v. *United States*, C.A. 7, Misc. No. 76-8086, decided September 17, 1976, certiorari denied, 429 U.S. 1050; *Andrino* v.

[13] We have filed a petition in *Edwards* simultaneously with this petition, and we have furnished a copy of the *Edwards* petition to counsel for respondents. See also *Kortness* v. *United States*, 514 F.2d 167 (C.A. 8); *Kills Crow* v. *United States*, 555 F.2d 183 (C.A. 8) (discussing more than five other Eighth Circuit cases that dealt with the same question).

[14] See also *United States* v. *DiRusso*, 535 F.2d 673 (C.A. 1); *Thompson* v. *United States*, 536 F.2d 459, 460 n. 1 (C.A. 1); *United States* v. *DiRusso*, 548 F.2d 372 (C.A. 1).

[15] Cf. *Billiteri* v. *United States Board of Parole*, 541 F.2d 938, 944 (C.A. 2) (habeas corpus is the exclusive jurisdictional base for review of parole decisions, and the "only remedy * * * is to order the [Commission] to correct the abuses or wrongful conduct within a fixed period of time * * *").

[16] See also *Jenks* v. *United States*, C.A. 6, No. 76-2699, decided June 17, 1977, certiorari denied, January 9, 1978 (No. 77-572).

United States Board of Parole, 550 F.2d 519 (C.A. 9).[17] The Fifth Circuit has indicated that it is inclined to follow these five courts if it should be squarely presented with the problem. *United States* v. *Kent*, 563 F.2d 239 (C.A. 5).[18] The conflict is well established, and it should be resolved by this Court.

2. Three assumptions of fact or conclusions of law undergird the court of appeals' decision. They are: first, that until 1973 the Commission paid scant attention to the gravity of the offense but has changed its practice to respondents' detriment; second, that it is properly within the province of district courts to have "expectations" about how the Commission would exercise its discretion within the limits established by the sentence; and third, that these expectations may be "vindicated" on collateral attack. If the court of appeals is wrong on any one of these points, its judgment cannot be sustained. We discuss the second and third points first, because they are of the greatest general importance.

a. The court of appeals reasoned that, because

[17] See also *Tedder* v. *United States Board of Parole*, 527 F.2d 593, 594 n. 1 (C.A. 9); *Elliott* v. *United States*, 572 F.2d 238 (C.A. 9); *Bonanno* v. *United States*, C.A. 9, No. 76-1122, decided March 3, 1978, petition for a writ of certiorari pending, No. 77-1665.

[18] *Kent* held that a sentence imposed after November 1973 may not be reduced despite any frustration of the sentencing judge's subjective expectations. See also *Blau* v. *United States*, 566 F.2d 526 (C.A. 5). A panel of the Fifth Circuit asserted (in *dicta*) in *United States* v. *McIntosh*, 566 F.2d 949, that sentences imposed before November 1973 could be reduced under Section 2255, but it later withdrew the opinion (566 F.2d at 952).

judges have almost unlimited control of the maximum sentence, they must also have control of the actual amount of time to be served (App. A, *infra*, pp. 8a-9a). That conclusion is a *non sequitur*. Congress gave to judges the power to fix maximum and minimum terms, and to the Commission the power to determine the release date within those limits (see pages 4-8, *supra*). Congress has provided that the judicially-fixed minimum term cannot exceed one-third of the maximum sentence set by the court. The denial of judicial power to fix a precise release date, coupled with the grant of releasing power to the Commission, establishes an allocation of functions that courts may not disregard.

The Court recognized this allocation of functions in *United States* v. *Grayson*, No. 76-1572, decided June 26, 1978, slip op. 6. So long as Congress adheres to its decision to commit release decisions to an administrative panel, courts may not insist that the administrative body exercise its discretion in any particular way, and any attempt to "vindicate" the personal expectations of the sentencing judges would nullify the legislative plan. As the First Circuit explained in *United States* v. *DiRusso*, 548 F.2d 372, 374-375: "the division of responsibility between the sentencing court and the Parole Commission would be seriously skewed if a sentence could be vacated whenever the Parole Commission exercised its discretion so that a particular prisoner was to be confined for a substantially longer period than the sentencing judge had contemplated. * * * To permit the district court to revise a sentence whenever the Parole Commission's de-

cision was inconsistent with his intent would divest the Commission of its discretionary power under the law, and defeat the objectives of placing the parole decision in a separate body." The same court also concluded that the Commission is entitled to exercise its discretion in any reasonable way, and "[w]e do not see how the [Commission's] proper exercise of [its] own authority can be said to revest the court with sentence review powers" (*United States* v. *McBride, supra*, 560 F.2d at 11).

b. Congress deprived judges of the power to fix precise release dates because they are not well situated to follow a case long after the trial and because they cannot adjust release dates to "balanc[e] differences in sentencing policies and practices between judges and courts." [19] After fixing sentence, "the judge becomes progressively less familiar with the considerations material to the adjustment of punishment to fit the criminal. At the same time, the officials of the Executive Branch responsible for these matters become progressively better qualified to make the proper adjustments." *Affronti* v. *United States*, 350 U.S. 79, 84 n. 13. This Court therefore has held that judges do not have any general power to revise sentences after their imposition, even though new information has come to a court's attention. See *Affronti* v. *United States, supra*; *United States* v. *Murray*, 275 U.S. 347. The Court stated in *Murray* that the Executive Branch possesses the sole power to release

[19] S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976).

a defendant before his maximum term, unless Congress clearly intended to allow courts to exercise a coordinate sentence reduction power in particular cases (275 U.S. at 356-357). Moreover, "it is unlikely that Congress would have found it wise to make [judicial control over the sentence] apply in such a way as to unnecessarily overlap the parole and executive-clemency provisions of the law." *Affronti, supra*, 350 U.S. at 83.

Fed. R. Crim. P. 35 modifies the result of *Affronti* and *Murray* by giving courts authority to reduce sentences during the first 120 days after the sentence has become final. This time cannot be extended. See Fed. R. Crim. P. 45. The time limit of Rule 35 presumes that only the Executive Branch may reduce a lawful sentence thereafter. Given that presumption, and the rule of *Affronti* and *Murray*, the court of appeals was wrong in concluding that 28 U.S.C. 2255, which allows courts to set aside sentences that are "subject to collateral attack," supplies a residual source of judicial authority to revise sentences in response to parole decisions. The "subject of collateral attack" provision of Section 2255 is not a catch-all that authorizes courts to do whatever they believe is required in the interests of justice. "[T]he appropriate inquiry [is] whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice'" (*Davis* v. *United States*, 417 U.S. 333, 346, quoting from *Hill* v. *United States*, 368 U.S. 424, 428).

Respondents' sentences were lawful when imposed; respondents do not here contest the findings of guilt, and their sentences were well within the statutory maxima. Those sentences authorized confinement until their expiration, and the decision of the Commission not to release respondents does not violate the Constitution or laws of the United States. It is therefore difficult to understand how a decision by the Parole Commission that respondents must continue to serve those lawful sentences makes the sentences "subject to collateral attack" within the meaning of Section 2255. Service of a lawful sentence imposed after a fair trial is not a "complete miscarriage of justice" that authorizes modification of a sentence on collateral review.

The sentencing process described by this Court in *Grayson* is replete with possibilities of misunderstanding. A court does not possess perfect information at the time of sentencing. But just as a judge could not reduce a sentence five years after its imposition because he has been persuaded that the defendant is not the malefactor the judge once thought him to be, so the judge cannot reduce a lawful sentence because he is surprised to learn that the parole authorities do not yet find the defendant suitable for release on parole.

c. At all events, the court of appeals' assumption that the Parole Commission radically changed its approach to its task after respondents had been sentenced is wrong. The court thought that, until 1973, prisoners with good institutional adjustment could ex-

pect to be released after serving one-third of their sentences [20] and that the Commission disregarded offense severity in making parole decisions (App. A, *infra*, p. 11a). But the bench and bar were on notice at least as early as 1962 that the gravity of the offense, and the prisoner's part in it, played important roles in the decision to grant or deny parole.[21] No judge should have thought that the Commission would ignore the nature of the crime in making its decisions.

Moreover, a sample of the parole records of federal prisoners given hearings in 1970—the year Addonizio was sentenced—demonstrates that most prisoners were not released until well after one-third of the maximum sentence. Indeed, in 1970 only 42.2 percent of prisoners with good institutional records

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[20] But see *Ryan* v. *United States*, 547 F.2d 426, 427 (C.A. 8) ("When the district court sentenced Ryan (in 1971) it could not have reasonably expected that he would be paroled at any given time—only that he would be eligible for parole at the one-third point of his sentence").

[21] See, *e.g.*, Federal Judicial Center, *Deskbook for Sentencing* V6-7 (1962) ("There are various factors related to the prisoner which the Board of Parole may consider as they vote for or against parole. A partial list of these are the following: * * * (a) The offense * * *"); remarks of Richard A. Chappell, Chairman of the Board of Parole, at the November 1964 Institutes on Sentencing, *Federal Parole*, 37 F.R.D. 207, 210 ("I think I should report to you on the criteria for * * * granting parole. Time will permit only a brief categorizing of major considerations: 1. Gravity of the Offense * * *"); Board of Parole, *Biennial Report* 22 (1970) ("The factors which the Board uses to make decisions in accordance with the above [statutory] criteria are classified in the following general categories * * * (B) Facts and circumstances of the offense * * *").

and no prior convictions were released at the one-third point.[22]

By establishing guidelines, the Parole Commission has changed the way it exercises its discretion. The Commission continues to make adjustments, and an evolution of paroling practices is a natural concomitant of granting discretion to a special body with changing membership and with sensitivity to changing penological philosophy. A change in paroling practices is especially likely when the administrative agency engages—as the Commission has—in research and experimentation designed to improve its practices and to promote decisions that are fairer and more uniform. But this evolution simply shows that the

[22] Statistics derived by the Commission's staff from computer coded information that was prepared by the research staff of the National Commission on Crime and Delinquency during its study of federal parole decisionmaking between 1969 and 1972 reveal that during 1970, of persons who received sentences under 18 U.S.C. 4205(a) and who had no prison disciplinary infraction, 21.8 percent were released after one-third of their sentences, 16.7 percent were released sometime after the one-third point, and 61.5 percent were held until mandatory release. If the sample is confined to first offenders, the figures are 42.2 percent released at one-third, 27.9 percent released after one-third, and 29.9 percent held until mandatory release.

Persons sentenced under 18 U.S.C. 4205(b)(2) fared slightly better. Of persons with no disciplinary infraction, 31.0 percent were released at or before the one-third point, 25.6 percent were paroled after the one-third point, and 43.4 percent were held until mandatory release. Of those in this group who were first offenders, 58.5 percent were paroled at or before the one-third point, 26.2 percent were paroled later, and 15.4 percent were held until mandatory release.

Commission has used the discretion with which it was entrusted, and its use of discretion is not a reason for courts to claim a continuing authority to revise sentences.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 77-1542, 77-1621 and 77-2373

HUGH J. ADDONIZIO

v.

UNITED STATES OF AMERICA,
APPELLANT IN No. 77-1542

THOMAS J. WHELAN, and THOMAS M. FLAHERTY,
APPELLANTS IN No. 77-1621

v.

UNITED STATES OF AMERICA

THOMAS J. WHELAN, #73405-158,
THOMAS M. FLAHERTY, #73404-158,
APPELLANTS IN No. 77-2373

v.

FLOYD E. ARNOLD, WARDEN, U. S. PENITENTIARY,
LEWISBURG, PA., and MAURICE H. SIGLER, CHAIRMAN,
UNITED STATES BOARD OF PAROLE

Argued Jan. 12, 1978

Decided Feb. 27, 1978

As Amended April 3, 1978

Before ALDISERT and HUNTER, Circuit Judges, and CAHN, District Judge.*

OPINION OF THE COURT

ALDISERT, Circuit Judge.

These appeals require us to examine again the propriety of post-sentencing relief under 28 U.S.C. § 2255 [1] by a sentencing court upon a showing that the sentencing judge's expectations were frustrated by subsequent changes in criteria considered by the Parole Commission granting or denying release. *See* 39 Fed.Reg. 20028-39 (1974), now codified as amended in 28 C.F.R. § 2.20 (1976). In No. 77-1542, the government has appealed from relief granted to Hugh J. Addonizio by the sentencing judge. Appellants Thomas J. Whelan and Thomas M. Flaherty appeal at No. 77-1621 from the judgment of the district court refusing

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* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1] § 2255. *Federal custody; remedies on motion attacking sentence*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

relief requested under § 2255, the decision having been made by a member of the court substituting for the now deceased sentencing judge. They also appeal at No. 77-2373 from a denial of relief in a separate action under 28 U.S.C. § 2241 for reasons that track those asserted in their § 2255 case.

I.

In the seminal case of *United States* v. *Salerno*, 538 F.2d 1005 (3d Cir. 1976), this court formulated a rule that resentencing is required in a § 2255 proceeding where implementation of the Parole Commission's guidelines frustrated the sentencing judge's probable expectations in the imposition of a sentence pursuant to 18 U.S.C. § 4208(a)(2).[2] In that case we found

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[2] § 4208. *Fixing eligibility for parole at time of sentencing*

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

* * * *

This provision has been recodified with minor alteration of language, at 18 U.S.C. § 4205(b). We will refer to it as § 4208(a), as it was codified at the time of imposition of sentence.

that the sentencing judge's intentions had been clearly stated at the time of sentencing. Subsequently, in *United States* v. *Somers*, 552 F.2d 108, 113 (3d Cir. 1977), we emphasized that "the intent and expectation of the district court judge who sentences under § 4208 (a) (2) . . . are controlling and . . . must be searched out to determine if relief may be ordered under 28 U.S.C. § 2255." Further, we said that "in our judgment, there can be no better evidence of a sentencing judge's expectations or intent than his own statement of those facts," *id.*, and determined that the intent or expectation could be derived from the sentencing judge's statement at the § 2255 hearing. In *United States* v. *Solly*, 559 F.2d 230 (3d Cir. 1977), we extended the rule of *Salerno* and *Somers* to a sentence imposed pursuant to 18 U.S.C. § 4208(a) (1).

II.

The threshold question of jurisdiction is critical to our analysis. The government argues here, as it did in previous cases before us, that a sentencing court has no jurisdiction to reduce a sentence after the period of 120 days after sentence or final unsuccessful appeal, as provided in Fed.R.Crim.P. 35,[3] *United*

[3] *Rule 35.*

CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

As amended Feb. 28, 1966, eff. July 1, 1966.

States v. *Robinson*, 361 U.S. 220, 226, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960); *United States* v. *Robinson*, 457 F.2d 1319 (3d Cir. 1972); *see also United States* v. *Olds*, 426 F.2d 562, 565 (3d Cir. 1970). The applications for relief here were made beyond the 120 day period.

We have previously rejected the government's contention that Rule 35 was the exclusive jurisdictional avenue for sentence reduction. *United States* v. *Salerno*, *supra*, 538 F.2d at 1008 n.4. Because the government repeatedly presents the Rule 35 contention, notwithstanding that the *Salerno* rule is now settled case law for the district courts in this circuit, it may be useful to explain the distinct bases of a district judge's authority under Rule 35 and § 2255 respectively. Rule 35's provision that a court "may reduce a sentence within 120 days" vests virtually unlimited power in the court to reduce the sentence without the necessity of any finding that the original sentence is subject to collateral attack or is otherwise contrary to law. By contrast, § 2255 vests in the sentencing court discrete jurisdiction to entertain a motion "to vacate, set aside, or correct" a sentence "at any time",

and provides that where the court concludes it "was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack", the court has the power to "discharge the prisoner or resentence him . . . or correct the sentence as may appear appropriate".

It should be readily apparent that although the district court has broad discretion under Rule 35 to reduce an otherwise legal sentence within the appropriate 120 days, relief under § 2255 is independently available if any of the specified reasons exists. *See Kills Crow* v. *United States*, 555 F.2d 183, 188 (8th Cir. 1977). We reiterate the position of this circuit, originally expressed in *Salerno*, and repeated in *Somers*, that sentencing courts do have jurisdiction to entertain the § 2255 motions presented in these appeals.[4]

III.

Before analyzing the specific factual backgrounds of the several appeals presented here, it is necessary to address the government's second major contention common to all the appeals before us. It argues that because *Salerno* and *Solly* involved sentences imposed

[4] Faced with a claim for relief based upon frustration of a district court's sentencing expectations by the subsequent change in Parole Policy Guidelines, the Eighth Circuit determined that the case came within the collateral attack clause of § 2255. *Kortness* v. *United States*, 514 F.2d 167, 170 (8th Cir. 1975), cited with approval in *Salerno, supra*, 538 F.2d at 1008 n.4.

pursuant to 18 U.S.C. § 4208(a), these cases may not serve as precedent for attacks on the sentences involved in the present appeals, which were imposed pursuant to 18 U.S.C. § 4202.[5]

A.

Our beginning point is a recognition that the *Salerno* holding was a legal rule in the narrow sense, in the Pound formulation, a legal precept "attaching a definite detailed legal consequence to a definite, detailed state of facts."[6] Nevertheless we expanded its reach to a different set of facts in *Somers* (where the intention of the sentencing judge was expressed at the § 2255 hearing and not at the time of sentence) and extended it yet further in *Solly* (to a § 4208(a)(1) sentence). Thus, from an original holding we have seen, in Cardozo's words, "[t]he directive force of a principle . . . exerted along the line of logical pro-

[5] § 4202. *Prisoners eligible*

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

This provision was subsequently repealed, Pub. L. 94-233, 90 Stat. 219 (1976); a substitute provision enacted at that time is codified at 18 U.S.C. § 4205(a).

[6] R. Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul.L.Rev. 475, 482 (1933). "Rules are

gression . . . ." [7] The answer to the government's contention, therefore, requires an inquiry into the instrumental principles that influenced the creation of the *Salerno* rule, and its subsequent extension to *Somers* and *Solly*. Only with these principles identified can we determine whether they can be applied to the cases before us.

Upon analysis we find that the major principle influencing these decisions was that a sentencing judge's intent and probable expectations should be vindicated to the fullest extent possible. The moral support [8] for this precept is self-evident. It is the sentencing judge —and no other judicial or administrative tribunal— who sets the maximum limits of any sentence. So long as the maximum comes within the statutory limits and the sentencing process follows appropriate procedures, there can be no judicial review of the sentence he pronounces. *Gov't. of the Virgin Islands* v. *Richardson*, 498 F.2d 892 (3d Cir. 1974). The rationale underlying this broad discretion afforded the sentencing judge is the same as that supporting the latitude given the trial judge in his other discretionary

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fairly concrete guides for decision geared to narrow categories of behavior and prescribing narrow patterns of conduct." G. Hughes, *Rules, Policy and Decisionmaking*, 77 Yale L.J. 411, 419 (1968).

[7] B. Cardozo, The Nature of the Judicial Process 30 (1921).

[8] We use the term "moral" in the sense of conventional morality. *See* H. L. A. Hart, The Concept of Law 165 (1961), for the thesis that legal principles derive from conventional morality, conceptualized as standards of conduct "which are widely shared in a particular society."

functions, namely, "the superiority of his nether position. It is not that he knows more than his loftier brothers; rather, he sees more and senses more." M. Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L.Rev. 635, 663 (1971). Given this near-absolute control over maximum punishment, it would necessarily follow that the sentencing judge's intentions and expectations as to actual time of incarceration should be vindicated to the greatest extent possible. The Parole Commission's decision was based on a set of guidelines which was not in effect at the time of sentencing. Under circumstances where the prisoner is required to serve an appreciably longer term of imprisonment because these subsequently adopted parole guidelines effect a provable frustration of those intentions and expectations, regard for the integrity of the sentencing court, as well as concepts of decency and fair play, dictate that that court should be in a position to vindicate those original intentions and expectations.

Woven in the texture of a legal principle, these moral considerations take the form of a right of a prisoner to relief upon proof that the sentencing judge's intentions and expectations regarding the prisoner's incarceration have been frustrated by a post-sentencing change in criteria governing parole determinations.

B.

So postulating the instrumental legal principle that led to the various results in *Salerno*, *Somers*, and

Solly, it should be readily discernible that the controlling determinant is not necessarily the specific statute pursuant to which the sentence was imposed, but rather, whether the facts disclose an expression of the sentencing judge's intentions and expectations and a subsequent frustration thereof by the change in guidelines. Thus, because the facts did so disclose in *Solly*, we had no difficulty in applying the principle that had previously commanded relief from a § 4208(a)(2) sentence in *Salerno* to a sentence imposed pursuant to § 4208(a)(1). We must now determine whether there exists a fundamental distinction between a § 4208 (a)(1) sentence and one imposed pursuant to § 4202 so as to command a different result here.

The starting point for this analysis is the relevant part of § 4202 which provides that a prisoner "whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term . . . ." Interpreting this statute in *Berry* v. *United States*, 412 F.2d 189, 192 (3d Cir. 1969), we said:

> In any normal sentencing procedure in the federal courts, a sentence prescribing a number of years of imprisonment generally means that the defendant may expect to serve approximately one-third of this term *with good conduct*. Probation and parole are concepts which our society have come to accept as natural incidents of rehabilitation during imprisonment.

(Emphasis supplied).

We could say this in 1969, because like the sentencing judges in the present appeals we knew that prior to 1970, the Parole Board relied on the criteria of former 18 U.S.C. §§ 4202 and 4203: (1) observation of the rules of the institution in which the prisoner is confined; (2) a reasonable probability that the prisoner will live and remain at liberty without violating the laws; and (3) release not incompatible with the welfare of society. *See* 28 C.F.R. § 2.2 (1971). We were also familiar with the views generally held by the sentencing judges in this circuit. Thus, the sentencing judge in *Somers* wrote: "Prior to the adoption of the new guidelines which are now in effect, and which became effective in late 1973, the Parole Board based its decision primarily upon institutional behavior and the probability of recidivism. See [28] C.F.R. § 2.4 (1973)." 552 F.2d at 112. And in *Salerno* we emphasized the importance of "district court sentencing practice." 538 F.2d at 1008. Thus, prior to the imposition of the new Parole Commission guidelines, both this court and the sentencing courts in this circuit operated under the assumption that, given a good institutional record, and aside from a finding of probable recidivism, the Parole Board would generally grant parole upon the completion of one-third of the sentence to any prisoner sentenced under § 4202.

This being so, there is no basic distinction between a sentencing judge's expectation of service of one-third of the sentence under § 4202, as generally per-

ceived by our trial and appellate judges, and service of a specific minimum period of incarceration imposed under § 4208(a)(1). If the *Salerno* rule were supported by sufficient and perceptible reason so as to apply it to *Solly's* § 4208(a)(1) sentence, no meaningful reason can be advanced for not applying the same rule for the same reason to a sentence imposed pursuant to § 4202. Thus, in Karl Llewellyn's words, "the rule follows where its reason leads; where the reason stops, there stops the rule." [9]

IV.

We turn now to the Addonizio case. Originally sentenced to ten years incarceration by Judge Barlow, he began serving his sentence on March 6, 1972. At the time Judge Barlow granted him release on April 28, 1977, he had served five years and two months of his ten-year sentence, considerably more than the 3⅓ years constituting the one-third usually associated with a § 4202 sentence.

On December 22, 1976 the Parole Commission had denied parole, stating this reason: "Pursuant to CFR 2.17 your offense behavior was part of a large scale criminal conspiracy or a continuing criminal enterprise." App. at 39. On January 13, 1977 the Commission again denied parole, stating:

> Your offense behavior has been rated as very high severity. Your salient factor score is 11. You have been in custody a total of 57 months at

[9] K. Llewellyn, The Bramble Bush 157-58 (1960).

> time of hearing. Guidelines established by the Commission for adult cases which consider the above factors suggest a range of 26-36 months to be served before release for cases with good institutional adjustment. After careful consideration of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense was part of an ongoing criminal conspiracy lasting from 1965 to 1968, which consisted of many separate offenses committed by you and approximately 14 other co-conspirators. As the highest elected official in the City of Newark, you were convicted of an extortion conspiracy in which, under color of your official authority, you and your co-conspirators conspired to delay, impede, obstruct, and otherwise thwart construction in the City of Newark in order to obtain a percentage of contracts for the privilege of working on city construction projects.
>
> Because of the magnitude of this crime (money extorted totalling approximately $241,000) its economic effect on innocent citizens of Newark, and because the offense involved a serious breach of public trust over a substantial period of time, a decision above the guidelines is warranted. Parole at this time would depreciate the seriousness of the offense and promote disrespect for the law.

App. at 27-28.

An earlier July 8, 1975 application had been rejected by the United States Board of Parole for the same reasons.

The Parole Commission's ostensible rationale in denying parole must now be placed in juxtaposition with the reasons stated by the sentencing court in originally imposing the ten-year sentence:

> THE COURT:
>
> * * * *
>
> Weighed against these virtues, [Mr. Addonizio's record of public service] . . . is his conviction by a jury in this court of crimes of monumental proportion, the enormity of which can scarcely be exaggerated and the commission of which create the gravest implications for our form of government.
>
> Mr. Addonizio, and the other defendants here, have been convicted of one count of conspiring to extort and 63 substantive counts of extorting hundreds of thousands of dollars from persons doing business with the City of Newark. An intricate conspiracy of this magnitude, I suggest to you, Mr. Hellring [defense counsel], could have never succeeded without the then-Mayor Addonizio's approval and participation.
>
> These were no ordinary criminal acts. . . . These crimes for which Mr. Addonizio and the other defendants have been convicted represent a pattern of continuous, highly-organized, systematic criminal extortion over a period of many years, claiming many victims and touching many more lives.
>
> Instances of corruption on the part of elected and appointed governmental officials are certainty not novel to the law, but the corruption disclosed here, it seems to the Court, is com-

> pounded by the frightening alliance of criminal elements and public officials, and it is this very kind of totally destructive conspiracy that was conceived, organized and executed by these defendants.
>
> . . . It is impossible to estimate the impact upon—and the cost of—these criminal acts to the decent citizens of Newark, and, indeed, to the citizens of the State of New Jersey, in terms of their frustration, despair and disillusionment.
>
> . . .
>
> Their crimes, in the judgment of this Court, tear at the very heart of our civilized form of government and of our society. The people will not tolerate such conduct at any level of government, and those who use their public office to betray the public trust in this manner can expect from the courts only the gravest consequences.
>
> * * * *
>
> It is, accordingly, the sentence of this Court that the defendant Hugh J. Addonizio shall be committed to the custody of the Attorney General of the United States for a term of ten years, and that, additionally, the defendant Hugh J. Addonizio shall pay a fine of $25,000. That is all.

App. 23-26.

A fair reading of the reasons given by the Parole Commission for denying parole clearly shows that they are identical with those stated by the court in justification of the hefty ten-year sentence—because Addonizio participated in an intricate conspiracy of

great magnitude, representing "a pattern of continuous, highly-organized, systematic criminal extortion." Judge Barlow stated that as a sentencing judge he "obviously took the nature and circumstances of the offense into account when the petitioner was sentenced, and deliberately imposed a harsh penalty to reflect the seriousness of the crime." App. at 11. He concluded, however, that the Parole Commission had changed the rules of the game after sentence was pronounced, to-wit, "there now seems to be a very much heightened emphasis on 'the nature and circumstances of the offense.' *See, e.g.*, 28 C.F.R § 2.18 (1976). Compare 28 C.F.R. § 2.2 (1971) . . . ." App. at 10. As Judge Barlow observed in granting § 2255 relief —resentencing Addonizio for the precise time then spent in imprisonment—the Parole Commission did not take into consideration the prisoner's "excellent institutional record and a very low likelihood of recidivism."

Thus, it appears that the very "nature and circumstances of the offense" which generated a deliberate imposition of "a harsh penalty" are now being used by the Parole Commission to deny the parole which was anticipated in the imposition of the original penalty. Traditional standards of criminal justice reject this apparent double punishment for the same factor —one punishment imposed by the sentencing court, the other by the Parole Commission. Judge Barlow realized this, and fashioned his order accordingly. For this reason, we will affirm the judgment of Judge

Barlow granting relief to Addonizio under § 2255. "In our judgment, there can be no better evidence of a sentencing judge's expectations or intent than his own statement of those facts." *Sommers, supra*, 552 F.2d at 113. Judge Barlow stated in relevant part:

> The Court anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that petitioner would be actually confined for a period of approximately three and one-half to your years of the ten year sentence, in view of the fact that he was a first-offender and that there appeared to be little probability of recidivism, given the circumstances of the case and his personal and social history. This sentencing expectation was based on the court's understanding—which was consistent with generally-held notions—of the operation of the parole system in 1970.
>
> * * * *
>
> . . . [T]he new emphasis on the nature and circumstances of the offense, in conjunction with other aspects of the new parole standards and procedures, has resulted in the frustration of this Court's sentencing expectations and intent.

App. at 10-11 (footnotes omitted).

The government would have us disregard the facial inequity of these circumstances by contending that Addonizio may not benefit from the *Salerno* rule, because here the Commission did not apply the guidelines (which would have released him after 26-36

months of incarceration) but instead applied a separate factor: "the offense behavior". The government's argument entirely misses the substance of Judge Barlow's position—at the time he sentenced Addonizio he assumed that the parole authorities would consider only institutional behavior and recidivism as parole factors, as then set forth in 18 U.S.C. § 4203; subsequently, the rules were changed; now an important factor is the "nature and circumstances of the offense." 28 C.F.R. § 2.18 (1976). Society cannot have it both ways; it cannot expose one to a harsh maximum—a ten-year term for what is considered to be a 26-36 month offense, and then, years later, for precisely the same reason which caused the harsh maximum to be imposed, impose a doubly harsh minimum.[10]

V.

In their appeals, Whelan and Flaherty similarly assert that the Parole Commission's denial of release based upon the nature of their offenses frustrates the intent of the sentencing judge. We first consider appeal No. 77-1621 from Judge Biunno's denial of § 2255 relief. We are disinclined to accept the invi-

[10] In *Musto* v. *United States*, 571 F.2d 136 (3d Cir. No. 77-1239), we declined an invitation to extend the rule of *Salerno* under circumstances where the sentencing court had knowledge of the existence of the new Parole Policy Guidelines. Addonizio, however, was sentenced under a widely-held belief that the Parole Board would not deny parole based on its independent assessment of the severity of the offense where the sentencing judge expressly based his sentence on the severity.

tation to examine the statements of Judge Shaw, the sentencing judge who is now deceased. We believe that this determination is for the district court in the first instance. Yet we are not content to accept Judge Biunno's examination of that transcript and conclusions thereafter reached. We believe that the § 2255 hearing judge should have the benefit of the rule this court announces today—that the *Salerno* rule does apply to sentences imposed pursuant to § 4202. Judge Biunno held otherwise, stating: "The *Silverman (Salerno)* case has no application here". Under these circumstances, the judgment of the district court must be vacated and the proceedings remanded.

Because the proceedings will be remanded, it is necessary to comment further on Judge Biunno's reasoning. We have heretofore delineated with specificity the issue to be determined in a § 2255 proceeding —whether there was a frustration of the intentions or the expectations of the sentencing judge by reason of new parole criteria. Judge Biunno's statement that "[t]he real issue is whether the Commission's denial of parole was arbitrary and capricious" was clearly wrong, for he confused the issue presented in a 28 U.S.C. § 2241 [11] proceeding, which was not properly

[11] § 2241. *Power to grant writ*

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

before him, with the § 2255 issue which was.

In contrast, the appeal of Whelan and Flaherty at No. 77-2373 is taken from Judge Muir's denial of relief under § 2241, and requires a review of the Parole Commission's determination. The proper standard of review was stated by Judge Muir:

> [T]he gist of this complaint is that the decision of the Parole Board to continue them past the amount of time that the guidelines suggest that they serve was without a rational foundation. In *Zannino* v. *Arnold*, 531 F.2d 637 [687] (3d Cir. 1976), the Court set forth the procedures to be followed by a district court in reviewing the sufficiency of a determination by the Parole Board to deny an inmate's request for release. The Court stated that 28 C.F.R. § 2.13 required that the Board furnish sufficient reasons for their decision to the inmate in order to afford him a chance to challenge the adequacy of those reasons. Once a sufficient statement has been given, the Court's function is to determine only if the Board abused its discretion and the relevant inquiry is "whether there is a rational basis in the record for the Board's conclusion." *Zannino*, 531 F.2d at 690-91.

(22a.)

We find no error in Judge Muir's application of the legal precepts to the record before him.

It bears emphasis, however, that the affirmance of Judge Muir's decision in the § 2241 proceeding is not *res judicata* as to the § 2255 proceeding which we

remand to Judge Biunno, for as previously emphasized, the thrust of the § 2255 proceeding is not a review of the Parole Commission's decision *per se*, but a *de novo* inquiry into whether there was a frustration of the sentencing court's intentions and expectations.

VI.

Accordingly, the judgment of the district court in the Addonizio case at No. 77-1541 and the judgment of the district court in the Whelan and Flaherty appeal at No. 77-2373 will be affirmed. The judgment of the district court at No. 77-1621 will be vacated and the cause remanded for reconsideration in light of the foregoing opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1542

HUGH J. ADDONIZIO

vs.

UNITED STATES OF AMERICA, APPELLANT

(D.C. Civil No. 76-2048)

On Appeal from the United States District Court
for the — District of New Jersey

Present: ALDISERT and HUNTER, *Circuit Judges*
and CAHN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 12, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the order judgment of the said District Court, filed April 27, 1977, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ Thomas F. Quinn
Clerk

February 27, 1978

* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1621

WHELAN, THOMAS J., FLAHERTY, THOMAS M.

vs.

UNITED STATES OF AMERICA
THOMAS J. WHELAN and THOMAS J. FLAHERTY,
APPELLANTS

(D.C. Civil No. 76-2220)

On Appeal from the United States District Court
for the — District of New Jersey

Present: ALDISERT and HUNTER, *Circuit Judges*
and CAHN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on January 12, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 11, 1977, be, and

* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

the same is hereby vacated, and the cause remanded for reconsideration in light of the opinion of this Court.

ATTEST:

/s/ Thomas F. Quinn
Clerk

February 27, 1978

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2373

THOMAS J. WHELAN, #73405-158
THOMAS M. FLAHERTY, #73404-158, APPELLANTS

vs.

FLOYD E. ARNOLD, Warden, U.S. Penitentiary, Lewisburg, Pa. and MAURICE H. SIEGLER, Chairman, United States Board of Parole

(D.C. Civil No. 77-373)

On Appeal from the United States District Court for the Middle District of Pennsylvania

Present: ALDISERT and HUNTER, *Circuit Judges* and CAHN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on January 12, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said

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* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

District Court, filed September 29, 1977, be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:

/s/ Thomas F. Quinn
Clerk

February 27, 1978

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 76-2048

[Filed Apr. 27, 1977]

HUGH J. ADDONIZIO

v.

UNITED STATES OF AMERICA

OPINION

BARLOW, *District Judge.*

This is a motion for vacation of sentence and for resentencing pursuant to 28 U.S.C. § 2255 (1971). The petitioner, Hugh J. Addonizio, was convicted of one count of conspiracy and sixty-three (63) counts of extortion.[1] On September 22nd, 1970, this Court imposed a term of imprisonment of ten years and a fine of $25,000.00, pursuant to 18 U.S.C. § 4202 (1969).[2] The petitioner commenced service of his sentence on March 6th, 1972.

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[1] *See generally United States* v. *Addonizio*, 313 F. Supp. 486 (D.N.J. 1970), *aff'd*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

[2] The provisions of former § 4202 were changed somewhat by the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976), but the changes are not relevant to this case. The sentencing provision of former § 4202 is now contained in 18 U.S.C. § 4205(a) (Supp. 1977).

At the time sentence was imposed, this Court expected that petitioner would receive a meaningful parole hearing—that is, a determination based on his institutional record and the likelihood of recidivism [3] —upon the completion of one-third (⅓)[4] of his sentence. The Court anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that petitioner would be actually confined for a period of approximately three and one-half to four years of the ten-year sentence,[5] in view of the

[3] Prior to 1973, it was generally understood that the Parole Board based its decisions primarily upon institutional behavior and the probability of recidivism. *See, e.g., United States* v. *Somers,* No. 76-2009, slip op. at 8-9 (3d Cir., filed Feb. 25, 1977) (remarks of sentencing judge); *United States* v. *Salerno,* 538 F.2d 1005, 1007 (3d Cir. 1976); 18 U.S.C. § 4203 (1969). Prior to 1970, the Board relied on the three "statutory criteria": (1) observation of the rules of the institution in which the prisoner is confined: (2) a reasonable probability that the prisoner will live and remain at liberty without violating the laws; and (3) release not incompatible with the welfare of society. *See* 28 C.F.R. § 2.2 (1971). During 1970, the Board adopted a table of additional factors to supplement the statutory criteria. *See* The United States Board of Parole, *Biennial Report: July 1, 1968 to June 30, 1970,* at 21-22 (1971). This Court was not familiar with the existence or the potential impact of these additional factors at the time the petitioner was sentenced—September, 1970. The guideline system in effect since 1973 also was not within the contemplation of the Court when the petitioner was sentenced in 1970.

[4] *See* 18 U.S.C. § 4202 (1969); note 2 *supra.*

[5] The Court expected and intended that the petitioner would serve slightly more than one-third of his sentence. The one-third figure with which this Court was familiar in 1970 was a generally accepted estimate, *see Berry* v. *United States,* 412

fact that he was a first-offender and that there appeared to be little probability of recidivism, given the circumstances of the case and his personal and social history. This sentencing expectation was based on the Court's understanding—which was consistent with generally-held notions [6]—of the operation of the parole system in 1970.

Subsequent to the imposition of sentence upon the petitioner, new standards and procedures were adopted for use in parole determinations. *See, e.g., United States* v. *Salerno,* 538 F.2d 1005, 1007 (3d Cir. 1976); Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976) [codified in 18 U.S.C. § 4201 *et seq.* (Supp. 1977)]. For example, in addition to consideration of the institutional record and the probability of recidivism, there now seems to be a very much heightened emphasis on "the nature and circumstances of the offense." *See, e.g.,* 28 C.F.R. § 2.18 (1976). *Compare* 28 C.F.R. § 2.2 (1971); note 3 *supra.*

It is clear that this new emphasis has had a substantial adverse impact on the petitioner's eligibility for parole. He has now served more than one-half of his ten-year sentence and has twice been denied parole, despite his excellent institutional record and a very low likelihood of recidivism. Both denials were

F.2d 189, 192 (3d Cir. 1969), and was even acknowledged by the Parole Board, *see* The United States Board of Parole, *supra* note 3, at 23.

[6] *See* notes 3-5 *supra.*

predicated primarily on the nature and circumstances of the petitioner's offense. *See United States ex rel. Addonizio* v. *Arnold*, 423 F. Supp. 189, 190 n.4 (M.D. Pa. 1976); Supplemental Brief for Petitioner, Exhibit A.

Thus, it is obvious that the petitioner has not received the type of meaningful parole hearing contemplated by the Court at the time of sentencing.[7] The Court obviously took the nature and circumstances of the offense into account when the petitioner was sentenced, and deliberately imposed a harsh penalty to reflect the seriousness of the crime. The Court did not expect that those particular facts would continue to have an impact on the length of time served by the petitioner. In other words, the Court did not anticipate that the Parole Commission would place such an emphasis on those particular facts that they would become obstacles to the petitioner's release on parole.

Thus, the new emphasis on the nature and circumstances of the offense, in conjunction with other aspects of the new parole standards and procedures, has resulted in the frustration of this Court's sentencing expectations and intent. The only real issue presented upon this motion is whether 28 U.S.C. § 2255 (1971) provides jurisdiction to challenge a sentence imposed under 28 U.S.C. § 4202 (1969) prior to the adoption of the new parole standards and procedures, when the intent of the sentencing judge is frustrated by the application of those standards

[7] *See* note 3 & accompanying text *supra*.

and procedures. It has been held that § 2255 is available to modify sentences where the import of the judge's sentence has in fact been changed by standards and procedures adopted subsequent to the imposition of the sentence. *See, e.g., United States* v. *Somers*, No. 76-2009 (3d Cir., filed Feb. 25, 1977);[8] *United States* v. *Salerno*, 538 F.2d 1005, *rehearing denied*, 542 F.2d 628 (3d Cir. 1976). However, the Government contends that this proposition should be limited to sentences imposed under 28 U.S.C. § 4208 (a)(2) (1969),[9] and should not be extended to sentences imposed under § 4202.

The Government's contention must be rejected. At least one other judge in this district has already extended the *Salerno* principle to a sentence imposed under § 4202. *See Pernetti* v. *United States*, Civ. No. 76-2369 (D.N.J., filed Mar. 3, 1977).[10] Furthermore, the only distinction between § 4202 and § 4208(a)(2) is the *timing* of the first parole hearing. There is nothing to indicate that the frustration perceived in *Salerno* and *Somers* related only to the timing of the parole hearing. Rather, those cases were primarily concerned with the meaningfulness of the hearing, once it was held. The crucial element was the frustration of the sentencing Judge's reasonable expectations as to the form and content and, consequently,

[8] 20 Crim. L. Rptr. 2545.

[9] The sentencing provision of former § 4208(a)(2) is now contained in 18 U.S.C. § 4205(b)(2) (Supp. 1977).

[10] 21 Crim. L. Rptr. 2033.

the likely outcome, of the hearing process. The possibility of such frustration is obviously not limited to sentences under § 4208(a)(2), because the new parole standards and procedures apply to both § 4202 sentences and § 4208(a)(2) sentences. Therefore, the holding of *Salerno* and *Somers* cannot logically be confined to cases involving § 4208(a)(2).

Having held that the doctrine of *Salerno* and *Somers* may be extended to sentences imposed under § 4202, and having found that that doctrine is applicable to the present case by reason of the frustration of the Court's original sentencing intent, this Court has a responsibility to correct the petitioner's sentence; indeed, the Court's judicial conscience demands that result.[11] Accordingly, the petitioner's sentence will be vacated and he will be resentenced to time served. An appropriate order will be submitted.

/s/ George H. Barlow
GEORGE H. BARLOW
United States District Judge

[11] It should be noted that one of the petitioner's co-defendants, who received precisely the same sentence as petitioner, was released on parole in March, 1976, after having served four years—slightly more than one-third—of his ten-year sentence.

APPENDIX F

UNITER STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civ. No. 76-2220, Cr. 567-70

THOMAS J. WHELAN and THOMAS M. FLAHERTY, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

March 3, 1977

OPINION

BIUNNO, District Judge.

This is the second application made by Whelan and Flaherty seeking release under 28 U.S.C. § 2255 or, in the alternative, for resentencing under 18 U.S.C. § 4208 (now 4205). A summary of the prior proceedings is appended to this opinion for convenience. An analysis of the evidence adduced against them and their co-defendants in the conspiracy/extortion trial (Cr. 570-70) is fully set forth in *U.S.* v. *Kenny*, 462 F.2d 1205 (CA-3, 1972).

Suffice it to say here that the evidence established the existence of a deliberate, thoroughly organized and fully executed scheme and practice, on the part of public officials, to extort money from persons doing business with the City of Jersey City and the County of Hudson, with arrangements to share the loot among the participants.

Among other items, the evidence showed cash totalling $700,000 being used to buy bearer bonds for John V. Kenny, with the assistance of one Sternkopf (who was supposed to be the independent city auditor) to conceal the source of the money and the ownership of the bonds. It showed that Whelan and Flaherty arranged to open "numbered" bank accounts in a Florida bank, in which cash and bearer bonds totalling more than $1.2 million was deposited to their credit. See, for example, "The J. V. Kenny Bonds", discussed at 462 F.2d pp. 1219 to 1220, and "The Whelan and Flaherty Accounts", discussed at 462 F.2d pp. 1220 to 1221, including the fact that 4 checks totalling more than $84,000 had not been negotiated as of June 22, 1971.

No serious argument can be made that the 15 year jail sentences were unduly harsh, or even that they are not proper sentences. No claim can be advanced that Whelan and Flaherty were "Robin Hoods", taking from the rich to aid the poor. On the contrary, since the extorted funds could only come from the public treasury, what they did was to rob the poor to enrich themselves and their cohorts. Judge Shaw

fully appreciated this and made explicit reference to it at sentence time.

For the most part, what is argued now is a rehash of what was argued before Judge Shaw on the Rule 35 motion, and what was argued in the 1973 motion under 28 U.S.C. § 2255. Both motions were denied, and the denials were affirmed as noted in the attached Summary. As provided in 28 U.S.C. § 2255, "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." The provision is a salutary one, and this court adheres to it.

The only point that is new is that the denial of parole by the Parole Commission is a frustration of Judge Shaw's intent when he imposed the 15 year sentences. This claim is grounded on *U.S.* v. *Salerno, Appeal of Silverman*, 538 F.2d 1005 (CA-3, 1976), *reh. den.* 542 F.2d 628 (CA-3, 1976). The issue so raised is whether this court, as a sentencing court, has any jurisdiction at all under 28 U.S.C. § 2255, or whether the only remedy available to the prisoner is by writ of habeas corpus under 28 U.S.C. § 2241, before the district court having jurisdiction over their place of incarceration, namely, the Middle District of Pennsylvania.

In that sense, the real issue is whether the Parole Commission's denial of parole was arbitrary and capricious. There is no doubt in this court's mind that the Commission's denial was affected, at least in part, by its concern that the wide public knowledge of the

existence of the $1.2 million of loot withdrawn from the Florida bank, coupled with complete silence about its subsequent history, would preclude an affirmative finding that release on parole would not "depreciate the seriousness of his offense or promote disrespect for the law", 18 U.S.C. § 4206(a)(1), as added by Pub.L. 94-233, sec. 2.

The spectacle of Whelan and Flaherty being paroled and free to escape with their ill-gotten gains to some Costa Rican or other haven, to luxuriate in comfort, may have been more than the Parole Commission could stomach. But that question, if it has substance, is for a proceeding under 28 U.S.C. § 2241 in the Middle District of Pennsylvania. This court lacks jurisdiction to decide it. If it could, it would find the action of the Parole Commission proper, since the spectacle is revolting.[1]

The *Silverman* case has no application here. It involved what was obviously intended to be a "light" sentence of 3 years, imposed under 18 U.S.C. § 4208(a)(2) [now 4205(b)(2)]. The parole guidelines, adopted after sentence, reflected the retrospective,

[1] At the hearing of January 10, 1977, counsel presented some argument based on statements made on questions asked at the parole hearing. These could not be considered without a transcript, and arrangements were made to secure the sound recording tapes, from which counsel has prepared a partial transcript. After this had come in, the court asked both sides whether any further argument or submission was desired in light of the added material. Both sides have independently informed the court that they rest on the argument and submissions already made.

statistical distribution on a Gaussian curve of the range of time in jail for that offense. The question would have better been decided as a review of parole action under 28 U.S.C. § 2241, but the consequences of the new guidelines were so much in contrast to the sentence imposed, in light of the explicit statement of the sentencing judge, that the Court of Appeals was moved to bring the issue within 28 U.S.C. § 2255. It made clear, however, that the circumstances of the case were unique, and that the decision did not establish the sentencing court as a super parole board.

Whatever the soundness of *Silverman* and like decisions may be, no basis for enlarging this court's jurisdiction is shown. The guidelines in these cases show no more than that thieving public officials in the past probably have gotten off too lightly. Judge Shaw's sentencing statements, and his denial of the Rule 35 motion, show that he had no intention of continuing that practice. The "way of life" which was reflected in the evidence was rotten to the core, and Judge Shaw clearly intended, by his sentences, to try to bring it to an end.[2]

[2] Even if there were jurisdiction here, and even if this court were inclined to "release Whelan and Flaherty now" (which it is not), a resentencing now would inevitably frustrate Judge Shaw's intent on sentencing. A resentencing to "time served", for example, would release them free of parole supervision for the remainder of the 15 years, and thus deprive the parole commission of the means to impose such conditions on parole as the cases call for under 18 U.S.C. § 4209 [1976].

[Footnote continued on page 38a]

This court is satisfied, from a detailed review of the materials, that Judge Shaw would have experienced no sense of frustration at all from the denial of parole. At the time of sentencing, Whelan and Flaherty had to serve one-third of the 15 year sentences before being *eligible* to apply. Under that law, given full credit for "good time" allowances, they would not be entitled of right to be paroled until they had served somewhat more than 75% of their sentences. Under the 1976 amendments, they must be released on parole after serving ⅔ of their sentences, absent certain affirmative findings, 18 U.S.C. § 4206(d), as added by P.L. 94-233, sec. 2.

Being eligible, of course, merely allows the application to be made, but the grant of parole is a different matter which, as this court noted in its earlier ruling, is a matter placed by the Congress in the hands of the parole commission, where it belongs.

This is not a case which resembles *Silverman*, or like cases, where a unique aspect or narrow circumstances leads to a frustration of the intention of the sentencing judge. As the Court of Appeals observed, the sentences imposed on the various defendants in this case recognized the varying levels of participa-

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[2] [Continued]

The only suitable mechanism that appears to exist for this case is that set forth by 18 U.S.C. § 4205(g) [1976], under which the Bureau of Prisons may move the sentencing court to reduce the *minimum* term to the time the defendant has served. There has been no such motion by the Bureau, and hence no jurisdiction under that provision.

tion in the conspiracy. See 462 F.2d 1218, footnote 7, and the array of sentences listed in 462 F.2d 1210, footnote 1. The range runs from the straight 15 year sentences imposed on three participants, down to a probationary sentence. In no instance did Judge Shaw employ the options under former 18 U.S.C. § 4208(a)(1) or (a)(2) [now 4205(b)(1) and (b)(2)], and nothing presented or reviewed carries the slightest suggestion that a denial of parole on the first eligible application embodies any frustration of his intent.[3]

The presentation made here is also eloquent by its silence. Great emphasis is placed on the fact that Judge Shaw regarded the decision to withdraw the appeals and to plead guilty to the income tax charges as indicating that the first step had been taken on the long road to earning a return to society. He gave weight to that when he imposed a concurrent 5 year sentence, which has already run out, and imposed a fine of $10,000, which has not been paid. There is not another word of other steps taken on the long road.

The convictions are final, and the statute of limi-

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[3] And see *U.S.* v. *Somers* (*Ponzio, Appellee*), decided February 27, 1977 by the Court of Appeals, Third Circuit, No. 76-2009, emphasizing that the scope of *Silverman* will not be relaxed or departed from, and that it is to be limited to cases where sentence is imposed under 18 U.S.C. 4208(a)(2) [now 4205(b)(2)], and where the intention at sentence time is later thwarted by the guidelines. Other reasons for dissatisfaction with the parole commissions action are not a basis for the invoking of Silverman. See, especially, III, of that opinion.

tations has doubtless run on other wrongdoings, if there were any. Yet Whelan and Flaherty evidently feel bound by the code of silence which is commonly part of an organized criminal conspiracy like this, not only about their $1.2 million of loot but also about the inside details, the working and machinery, by which the conspiracy was carried out. A baring of these details might impress a parole commission that the change of attitude has passed beyond the first step, but there is only silence.

The court accordingly finds that none of the criteria specified by 28 U.S.C. § 2255 for the granting of relief thereunder appear to exist, and there is no ground for release, or for vacating, modifying or correcting the sentences imposed.

APPENDIX

SUMMARY OF EARLIER PROCEEDINGS

U.S. v. *Whelan and Flaherty*

(Conspiracy and extortion, Cr. 567-70)

(Income tax evasion, Cr. 568-70; 570-70)

August 10, 1971. Whelan and Flaherty sentenced on verdict of guilty on 2 counts of conspiracy and 27 counts of extortion. General sentence of 15 years imposed by Judge Shaw. Bail pending appeal set at $400,000.

December 6, 1971. Whelan and Flaherty retracted pleas of not guilty and entered pleas of guilty on the separate income tax evasion

indictments. Appeals from convictions in Crim. 567-70 withdrawn.

February 17, 1972. Whelan and Flaherty sentenced on pleas of guilty on income tax indictments. General sentence of 5 years and $10,000 fine imposed on each by Judge Shaw, term sentences to be concurrent with 15 year terms on conspiracy and extortion convictions.

May 16, 1972. Motions of Whelan and Flaherty for reduction of 15 year sentences in Crim. 570-70, pursuant to F.R.Crim.P. 35, denied by Judge Shaw.

December 8, 1972. Denials of Rule 35 applications by Judge Shaw affirmed by Court of Appeals. CA #72-1588 and 1589.

December 12, 1973. Applications of Whelan and Flaherty for reduction of their 15 year sentences, under 28 U.S.C. § 2255 or, in the alternative, for resentencing under 18 U.S.C. § 4208, denied by Judge Biunno.

September 11, 1974. Judgment of Judge Biunno denying relief affirmed by Court of Appeals, CA #74-1127.

June 3, 1976. Hearing held at Lewisburgh on applications for parole.

July 12, 1976. Parole applications denied.

October 18, 1976. Hearing held on appeal before National Appellate Board. Appeals denied.

November 22, 1976. Motion filed in U.S. District Court, Civ. 76-2220, for release of Whelan and Flaherty from custody under 28 U.S.C. § 2255, or in the alternative to modify or alter the sentences under 18 U.S.C. § 4208 (now sec. 4205).

January 10, 1977. Hearing held on motion. Decision reserved pending receipt of transcript of hearing of October 18, 1976 before National Appellate Board.

February 4, 1977. Partial transcript of October 18, 1977 hearing received.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 77-373

Petition Filed 5/4/77

(Judge Muir)

[Filed Williamsport, Pa., Sep. 29, 1977]

THOMAS J. WHELAN and THOMAS N. FLAHERTY, PLAINTIFFS

vs.

FLOYD E. ARNOLD, et al., DEFENDANTS

OPINION

MUIR, District Judge.

Petitioners Whelan and Flaherty have filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 alleging that the actions of the United States Parole Commission denying their application for parole violated their rights. On May 4, 1977, Petitioners filed a memorandum of law in support of their petition. On May 25, 1977, Respondents filed an answer to this Court's show cause order. Whelan and Flaherty filed a reply brief on June 10, 1977.

Petitioners are both serving 15 year sentences for violations of 18 U.S.C. §§ 1951 and 1952 and 26 U.S.C. § 7206(1), conspiracy to extor and income tax evasion, which were handed down on October 10, 1971

by the Honorable Robert Shaw, former United States District Judge for the District of New Jersey. Motions for reduction of sentence pursuant to F. R. Crim. P. 35 and for vacation of sentence pursuant to 28 U.S.C. § 2255 were denied by that Court. Both petitioners became eligible for parole after serving one-third of their sentence and a parole hearing was held at Lewisburg Penitentiary on June 3, 1976. On July 12, 1976 the Parole Board denied the application for parole and continued them for a further hearing in 1978. That action was affirmed by the National Appellate Board on October 19, 1976. Petitioners contend that the decision of the Parole Board had no rational basis in the record and therefore that they should be granted their release. They further contend that the Parole Board's decision to continue them beyond the guidelines recommended for inmates with their salient factor score and who have committed an offense of very high severity set forth in 20 C.F.R. § 2.20 frustrated the intent of the sentencing judge and constitutes a ground for re-sentencing.

A sentence can be set aside and an inmate remanded for resentencing if the actions of the Parole Board are so inconsistent with the intent of the sentencing judge that he would not have imposed the sentence which he handed down if he were aware of the actions which the Parole Board would have taken. The principle was applied in United States vs. Salerno (appeal of Silverman), 538 F.2d 1005 (3d Cir. 1976), where Silverman, the Defendant, had been sentenced

under former 18 U.S.C. § 4208(a)(2). After Silverman's sentencing, the Parole Board's regulations changed to the present guideline system. At his Parole hearing, the Board followed the guidelines which indicated that Silverman was to serve his entire sentence. He then brought an action under 28 U.S.C. § 2255 and the Court of Appeals noted that the trial judge's intention in sentencing Silverman under § 4208(a)(2), which allows an inmate to become eligible for parole immediately upon the commencement of his sentence, suggested that he should not serve the entire term. Therefore, the decision of the Parole Board to continue him to the expiration was contrary to the intent of the sentencing judge and would be set aside. Petitioners also cite Addonizio vs. United States, No. 76-2048 (D.N.J. April 27, 1977), which involved a sentence imposed under 18 U.S.C. § 4202, the same provision under which Petitioners were sentenced. The Court stated that at the time sentence was imposed it was expected that Addonizio would receive a meaningful parole hearing upon the completion of one-third of his term and that a determination of whether he should be released would be based upon his institutional record and the likelihood of recidivism as set forth in the then existing parole criteria. Subsequent to that time, the guideline system now in effect was adopted. Addonizio was denied parole at the one-third point of his sentence on different factors, including the nature and circumstances of his offense. The sentencing Court felt that its intention had been

frustrated by the application of these guidelines to Addonizio and consequently vacated his sentence and resentenced him to time served.

Both *Salerno* and *Addonizio* involved § 2255 motions addressed to the sentencing Court. The Petitioners brought this claim to the sentencing court's attention through a § 2255 motion but, in Whelan vs. United States, 427 F.Supp. 379 (D. N.J. 1977), that Court held that it did not have jurisdiction because "the real issue is whether the Parole Commission's denial of parole was arbitrary and capricious." That decision is not binding on this Court for purposes of conferring jurisdiction over the Petitioners' first claim under 28 U.S.C. § 2241, however.

In application of Galante, 437 F.2d 1164, 1165 (3d Cir. 1971), the Court stated that § 2255 requires a prisoner to exhaust his remedies in the sentencing court before bringing a habeas corpus action, including appealing a denial of relief to the Court of Appeals and petitioning for a writ of certiorari from the Supreme Court. *See also* Crismond vs. Blackwell, 333 F.2d 374, 377 (3d Cir. 1964); Deitle vs. United States No. 76-1359 (M.D. Pa. February 16, 1977). Had petitioners done so in this case, it appears that the Court of Appeals would have held that the sentencing court had jurisdiction to hear contentions based upon *Salerno* under § 2255. *See, e.g.*, United States vs. Somers, 552 F.2d 108, 113 n. 9 (3d Cir. 1977); United States vs. Salerno, 538 F.2d 1005, 1008 n. 4 (3d Cir. 1977).

The Court is reluctant to deny consideration to Petitioners' claim and force them to apply again to the sentencing court for relief. However, this Court may not entertain a habeas corpus petition unless the Petitioners' § 2255 remedy is inadequate or ineffective, and this requirement is jurisdictional. *See* Application of Galante, 427 F.2d 1164 (3d Cir. 1971); 28 U.S.C. § 2255. Therefore, Whelan and Flaherty's contentions based upon *Salerno* will be dismissed.

Whelan and Flaherty's second contention, and the gist of this complaint, is that the decision of the Parole Board to continue them past the amount of time that the guidelines suggest that they serve was without a rational foundation. In Zannino vs. Arnold, 531 F.2d 637 (3d Cir. 1976), the Court set forth the procedures to be followed by a district court in reviewing the sufficiency of a determination by the Parole Board to deny an inmate's request for release. The Court stated that 28 C.F.R. § 2.13 required that the Board furnish sufficient reasons for their decision to the inmate in order to afford him a chance to challenge the adequacy of those reasons. Once a sufficient statement has been given, the Court's function is to determine only if the Board abused its discretion and the relevancy inquiry is "whether there is a rational basis in the record for the Board's conclusion." *Zannino*, 531 F.2d at 690-91. *See also* Manos vs. United States Board of Parole, 399 F.Supp. 1103, 1105 (M.D. Pa. 1975). Therefore, the Court

must examine the statement of reasons furnished by the Parole Board to Whelan and Flaherty in order to determine whether a rational basis for the decision, as indicated by those reasons, existed.

The Board's full statement of reasons reads as follows:

> "Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody a total of 59 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After a review of all relevant factors and information presented, a decision above the guidelines at this consideration appears warranted because your offense was part of a large scale, organized criminal conspiracy and an ongoing criminal enterprise, according to presentence investigation dated July 30, 1971. In addition, the offense committed involved a violation of public trust."

Petitioners contend, citing Diaz vs. Norton, 376 F.Supp. 112 (D.Conn. 1974), that the Parole Board erred in taking into account the severity of the offense both in determining what the guideline range should be and in making a decision to continue Petitioners past the guideline.

In Diaz vs. Norton, 376 F.Supp. 112, 115 (D. Conn. 1974), the Court stated that a decision to continue

an inmate beyond the guidelines set forth in 28 C.F.R. § 2.20 based only upon the fact that release at that time would "depreciate the seriousness of the offense" was impermissible. The Court noted that the two most important factors in determining the guideline range were the inmate's salient factor score and the severity of the offense which he had committed. Therefore, a decision outside the guideline range could not be made based upon the same factors which were used to compute the guideline range. This does not preclude the parole board from considering other evidence in making its decision to deny an inmate release.

It is this Court's view that the decision of the Parole Board in this case was based upon reasons which it properly considered and which did not go into the formulation of the Parole Board's guidelines. There is clearly a difference in the offenses which are labelled as of "very high severity" under the Parole Board's guidelines. The Board may properly consider aggravating factors which relate to the commission of offenses within that category. The Board may consider, for example, the fact that permanent physical damage was done to a victim of the crime, see Hill vs. Attorney General, 550 F.2d 901, 902 (3d Cir. 1977), (per curiam), or that in addition to the offense committed, there was "evidence of a large scale conspiracy," see Foddrell vs. Sigler, 418 F.Supp. 324, 325 (M.D. Pa. 1976). *See generally* Manos vs. United States Board of Parole, 399 F.Supp. 1103 (M.D. Pa. 1975). Whelan and Flaherty were involved

in a large scale scheme to extort money from Jersey City taxpayers. There are indications in the record that some of the extorted monies were still aavilable to them upon their release. Further, both held positions of extremely high public trust, mainly the mayor and councilman of Jersey City, respectively. The Parole Board could properly conclude, based upon these considerations, that an exception should be made even though the underlying offense fit within the "very high severity" category and both petitioners had extremely good salient factor scores. While the guidelines are followed in a large majority of cases, see United States vs. Salerno, 538 F.2d 1005 (3d Cir. 1976), the Board should not be bound by guidelines when the circumstances of the crime are exceptional. The Court feels that the crimes committed by Whelan and Flaherty could properly have been considered as exceptional and that the circumstances surrounding their commission were properly taken into account in making a decision to continue them above the guidelines. Therefore, since a rational basis for the Board's decision exists, it will not be disturbed. Zannino vs. Arnold, 531 F.2d 687 (3d Cir. 1976).

An appropriate order will be entered.

/s/ Muir
MUIR
U.S. District Judge

DATED: September 29, 1977

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